

**APPENDIX V**

Supplemental Analysis for

PLAN AMENDMENT 61/61

TO THE FISHERY MANAGEMENT PLANS FOR

THE GROUNDFISH FISHERIES OF THE GULF OF ALASKA

AND

THE GROUNDFISH FISHERIES OF THE BERING SEA/ALEUTIAN ISLANDS

to implement American Fisheries Act conformance measures

(FORMERLY PLAN AMENDMENT 62/62)

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## EXECUTIVE SUMMARY

The American Fisheries Act of 1998 (AFA) significantly changed the management regime of the pollock fisheries in the Bering Sea, Aleutian Islands, and Gulf of Alaska. The AFA substantially changed the statutory climate in which the Council was acting during its deliberation for final action of I/O3 in June 1998. Along with other actions affecting the BSAI pollock fishery, it allocated 10% of the BSAI pollock TAC to the Western Alaska community development program (increased from 7.5%) and divided the remaining directed pollock fishery allocation: 50% to catcher vessels harvesting pollock for delivery to the inshore component; 40% to catcher processors harvesting pollock for processing by the offshore component; and 10% to catcher vessels harvesting pollock for processing by a new mothership component. As a result of AFA, on December 15, 1998, the Secretary disapproved the inshore/offshore allocations recommended by the Council in BSAI Amendment 51 for the period January 1, 1999 through December 31, 2001 and substituted the AFA percentages for 1999. Changing these percentages through 2004 in the BSAI FMP to conform with the AFA is the subject of Action 1.

AFA also signed into law changes to replacement restrictions for AFA-eligible vessels. This is the subject of Action 2. Action 3 is the sole action under consideration under GOA Amendment 62. This action is not mandated under the AFA, but conforms with Council intent to mirror the allocation sunset dates for pollock and Pacific cod allocations in the GOA and BSAI.

During its discussion of preparation of this analysis, the Council indicated that the actions under Alternative 2 for Actions 1, 2, and 3 were its preferred alternatives.

### **ACTION 1. BSAI POLLOCK ALLOCATIONS**

Alternative 1: No action.

Alternative 2: Change the current inshore/offshore directed pollock allocations in the Bering Sea/Aleutian Islands FMP to conform with those allocations mandated by the American Fisheries Act of 1998. *Preferred*

### **ACTION 2. GOA POLLOCK ALLOCATIONS SUNSET DATE**

Alternative 1: No action.

Alternative 2: Extend the sunset date of the current pollock and Pacific cod allocations in the GOA FMP to conform with the date mandated for the Bering Sea/Aleutian Islands area in the American Fisheries Act of 1998. *Preferred*

### **ACTION 3. REPLACEMENT VESSELS IN THE BSAI DIRECTED POLLOCK FISHERIES**

Alternative 1: No action.

Alternative 2: Change restrictions in the BSAI FMP to conform with replacement requirements for eligible vessels under the American Fisheries Act of 1998. *Preferred*

None of the alternatives are likely to significantly affect the quality of the human environment. None of the alternatives is expected to result in a "significant regulatory action" as defined in E.O. 12866. However, the FRFA will be completed by NMFS after opportunity for public comment on the proposed rule and IRFA.

## 1.0 INTRODUCTION

The groundfish fisheries in the Exclusive Economic Zone (EEZ) (3 to 200 miles offshore) off Alaska are managed under the Fishery Management Plan for the Groundfish Fisheries of the Gulf of Alaska (GOA) and the Fishery Management Plan for the Groundfish Fisheries of the Bering Sea and Aleutian Islands (BSAI). Both fishery management plans (FMP) were developed by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (Magnuson Act). The GOA FMP was approved by the Secretary of Commerce and become effective in 1978 and the BSAI FMP become effective in 1982.

Actions taken to amend FMPs or implement other regulations governing the groundfish fisheries must meet the requirements of Federal laws and regulations. In addition to the Magnuson Act, the most important of these are the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), Executive Order (E.O.) 12866, and the Regulatory Flexibility Act (RFA).

NEPA, E.O. 12866 and the RFA require a description of the purpose and need for the proposed action as well as a description of alternative actions which may address the problem. This information is included in Section 1 of this document. Section 2 contains information on the biological and environmental impacts of the alternatives as required by NEPA. Impacts on endangered species and marine mammals are also addressed in this section. Section 3 contains a Regulatory Impact Review (RIR) which addresses the requirements of both E.O. 12866 and the RFA that economic impacts of the alternatives be considered. Section 4 contains the Initial Regulatory Flexibility Analysis (IRFA) required by the RFA which specifically addresses the impacts of the proposed action on small businesses.

This Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) addresses three management actions affecting the groundfish fisheries off Alaska: 1) revising the BSAI FMP to reflect the inshore/offshore pollock allocations signed into law on October 21, 1998 under the American Fisheries Act of 1998 (AFA); 2) revising AFA-eligible vessel size length replacement restrictions; and 3) extending the current inshore/offshore allocations of pollock and Pacific cod in the Gulf through 2004.

### 1.1 Management Background

Inshore/Offshore (I/O) allocations of the BSAI and GOA pollock TAC and GOA Pacific cod TAC were originally established under Amendments 18/23 (I/O1) to the Bering Sea/Aleutian Island and Gulf of Alaska Fishery Management Plans, respectively, for 1993-95. The allocations were extended by the Council in Amendments 38/40 (I/O2) to the respective FMPs for 1996-98. In June 1998, the Council recommended another extension of the GOA allocations and recommended changing the BSAI pollock allocations from 65% offshore and 35% onshore to 61% offshore and 39% onshore for 1999-2001 under Amendments 51/51 (I/O3), after considerable discussion and debate. All three amendment packages contained "sunset" provisions, requiring the Council to reexamine the allocations in three years, or see them expire.

Current and potential preemption of resources by one industry sector over another was a focal issue for the Council with regard to setting the original inshore and offshore allocations of pollock and Pacific cod in the GOA and pollock in the BSAI in 1992. Though not necessarily a problem at that time in the BSAI, it was apparent that the capacity of the offshore catcher/processor fleet posed a real preemption threat to the inshore processing industry, which relied heavily on the pollock resource. During a series of meetings beginning in 1989, the Council and industry developed analyses of various alternative solutions to the preemption problem and set allocations of pollock and Pacific cod in the GOA and pollock in the BSAI in three separate inshore/offshore amendment packages described above. The inshore-offshore allocation issue became an

integral part of the overall effort towards addressing overcapitalization in North Pacific groundfish fisheries.

On January 1, 1996, access to the groundfish fisheries in the EEZ off Alaska, except those managed under the Individual Fishing Quota Program for Pacific halibut and sablefish, and commercial crab fisheries in the Bering Sea in and off of Alaska were limited under a vessel moratorium program. This program was intended by the Council, as implemented by National Marine Fisheries Service (NMFS), to be a first step in its comprehensive rationalization program to reduce excess capital and capacity in the affected fisheries.

On October 1, 1998, NMFS published a final rule (63 FR 52642) implementing part of the License Limitation Program (LLP) for BSAI and GOA groundfish and BSAI crab under Amendments 39/41/5. These amendments limited the number, size, and specific operation of vessels that may be deployed in the groundfish fisheries in the EEZ off Alaska, except for demersal shelf rockfish in Southeast Alaska and the halibut and sablefish IFQ fisheries. The crab LLP was effective beginning January 1, 1999. The groundfish LLP is expected to be effective on January 1, 2000. This program, upon implementation, supplants the vessel moratorium.

The American Fisheries Act, signed into law on October 21, 1998, substantially changed the statutory climate in which the Council was acting during its deliberation for final action of I/O3 in June 1998. Along with other actions affecting the BSAI pollock fishery, it allocated 10% of the BSAI pollock TAC to the Western Alaska community development program (increased from 7.5%) and divided the remaining directed pollock fishery allocation: 50% to catcher vessels harvesting pollock for delivery to the inshore component; 40% to catcher processors harvesting pollock for processing by the offshore component; and 10% to catcher vessels harvesting pollock for processing by a new mothership component. As a result of AFA, on December 15, 1998, the Secretary disapproved the inshore/offshore allocations recommended by the Council in BSAI Amendment 51 for the period January 1, 1999 through December 31, 2001 and substituted the AFA percentages for 1999. Changing these percentages through 2004 in the BSAI FMP to conform with the AFA is the subject of Action 1. AFA also signed into law changes to replacement restrictions for AFA-eligible vessels. This is the subject of Action 2.

The Secretary also approved GOA Amendment 51 in its entirety. One result of the Secretary's action is that the current I/O management program will sunset December 31, 2001 for the GOA under Amendment 51, without further Council action, and December 31, 2004 for the BSAI under the AFA. Changing the duration of the GOA pollock and Pacific cod allocations through 2004 is the subject of Action 3.

## 1.2 Purpose of and Need for the Action

On December 15, 1998, the Secretary partially approved Amendment 51 to the BSAI FMP and fully approved Amendment 51 to the GOA FMP which extended and revised the inshore and offshore allocations for pollock and Pacific cod in both FMPs for 1999-2001 (NPFMC 1998). Section 206 of the American Fisheries Act of 1998, which specifically mandates 10 percent of the pollock TAC for a directed fishing allowance for the CDQ program and stipulates specific allocations for the inshore and offshore sectors of the directed pollock fisheries, substantially changed the statutory climate in which the Council was acting in June 1998, when it approved Amendments 51/51 for submission to the Secretary. Hence, the Secretary partially disapproved some elements of Amendment 51 to the BSAI FMP that will not be further discussed in this EA/RIR.

Under the above provisions establishing allocations for the BSAI pollock fisheries, the AFA requires the Council and Secretary to act to conform the BSAI FMP with the AFA (Actions 1 and 2). The decision-making climate related to the sunset date for the GOA pollock and Pacific cod allocations in I/O3 has also changed (Action 3).

The salient part of the administrative record related to the AFA as it pertains to Amendments 51/51 is captured in the approval letter dated December 15, 1998, by the Administrator of the Alaska Region:

“The effective period for the allocations in [GOA] Amendment 51 is extended for another three years, from January 1, 1999, through December 31, 2001. The section 213 provisions of the AFA do not apply to the GOA allocations proposed by the Council. Therefore, the proposed duration of the amendment is not inconsistent with AFA, the Magnuson-Stevens Act or other applicable law.

Under Section 304 (a) (4) of the Magnuson-Stevens Act, the Council may submit a revised amendment in response to disapproved parts of an amendment proposal. Any inshore-offshore allocation measures that the Council may now wish to submit must be consistent with the AFA as well the Magnuson-Stevens Act and other applicable law. I recommend that the Council submit an FMP amendment that would. The Council may further wish to amend its December 31, 2001, sunset date for pollock and Pacific cod allocations in the GOA to be consistent with the AFA sunset date of December 31, 2004.”

At its December 1998 meeting, the Council initiated this analysis to: 1) amend the BSAI FMP to make the inshore/offshore pollock allocations consistent with the AFA; 2) amend the BSAI FMP regarding replacement of AFA-eligible vessels; and 3) amend the GOA FMP to extend the current allocation of GOA pollock and Pacific cod through December 31, 2004 to mirror the sunset date for inshore/offshore allocations of pollock and P. cod in the BSAI FMP.

## 1.2 Alternatives Considered

### 1.2.1 ACTION 1: BSAI POLLOCK ALLOCATIONS

#### 1.2.1.1 Alternative 1: No action.

Action 1, Alternative 1 would leave the current inshore/offshore directed fishery pollock allocations in place in the BSAI FMP. This would not conform with Section 206 of the American Fisheries Act of 1998 which specifically mandates 10 percent of the pollock TAC for a directed fishing allowance for the CDQ program through December 31, 2004, although the Council may adjust the CDQ allocation in two years (2001).

The Act also stipulates specific allocations for the inshore and offshore sectors of the directed pollock fisheries also through 2004. These allocations are implemented through the annual specification process. As such, the percentage allocations recommended by the Council in I/O3 were disapproved by the Secretary. Therefore, the no action alternative is not consistent with the Act and is therefore not a viable alternative for managing this fishery.

#### 1.2.1.2 Alternative 2: Change the current inshore/offshore directed pollock allocations in the BSAI FMP to conform with those allocations mandated by the American Fisheries Act of 1998.

Alternative 2 would change the current inshore/offshore directed pollock allocations in the BSAI FMP to the following allocations, with a sunset date of December 31, 2004:

10% of the BSAI pollock TAC to the Western Alaska community development program; and divide the remainder:

50% to catcher vessels harvesting pollock for delivery to the inshore component;

- 40% to catcher processors harvesting pollock for processing by the offshore component;
- 10% to catcher vessels harvesting pollock for processing by mother ships in the offshore component.

Only Alternative 2 appears to be consistent with Congressional intent to allocate the directed commercial BSAI pollock fishery to the CDQ, and inshore and offshore sectors of the directed pollock fishery. As stated in Section 1.2, the AFA requires the Council and Secretary to act such that pollock allocations and sunset dates conform with Section 206. The AFA clearly directs the Council and the Secretary to increase the pollock CDQ allocation from the existing 7.5 percent to 10 percent of the BSAI pollock TAC, and to change the directed fishery allocations to 50% to catcher vessels harvesting pollock for delivery to the inshore component; 40% to catcher processors harvesting pollock for processing by the offshore component; and 10% to catcher vessels harvesting pollock for processing by motherships. Section 213 of the AFA also mandates that the sunset date for these allocations be extended through December 31, 2004, although the CDQ allocation may be adjusted after two years. Without this change, the BSAI FMP would be out of conformance with Section 206 of the AFA.

## 1.2.2 ACTION 2: REPLACEMENT OF AFA-ELIGIBLE VESSELS

### 1.2.2.1 Alternative 1: No Action.

Action 2, Alternative 1 would leave in place the current vessel replacement restrictions enacted under the moratorium (BSAI Amendment 23) license limitation program (BSAI Amendment 39). The status quo would not conform with Section 206 of the American Fisheries Act of 1998 which specifically mandates that an AFA-eligible vessel may be replaced under certain conditions with specific criteria which differ from existing regulations. Therefore, the no action alternative is not consistent with the Act for AFA-eligible vessels and is therefore not a viable alternative.

### 1.2.2.2 Alternative 2: Change restrictions in the BSAI FMP to conform with replacement requirements for eligible vessels under the American Fisheries Act of 1998.

Section 202(a)(6) of the AFA mandated that in the event of the actual total loss or constructive loss, an AFA-eligible vessel may be replaced so long as the vessel was not lost due to willful misconduct of the owner or his agent. The replacement vessel must have been built in the US and if the vessel is (was) rebuilt, then that must also have taken place in the US. The replacement vessel must have made a landing by the end of the third calendar year after the year the vessel was lost or destroyed. If the lost vessel was greater than 165 ft in registered length, of more than 750 gross registered tons, or has engines capable of producing more than 3,000 shaft horsepower, the replacement vessel must be of equal or lesser length, tons, and horsepower. If the lost vessel was less than 165 ft registered length, then the replacement vessel may exceed the original vessel's length, gross tons, and horsepower by 10 percent, but only up to the thresholds. The replacement vessel must also meet the US ownership provisions of the AFA.

The AFA restrictions for replacing vessels in the BSAI pollock fisheries are different from the moratorium and LLP provisions that do not allow any increase in vessel length of a replacement for a vessel that was lost or destroyed. In addition, the 20% upgrade rule under the moratorium and LLP only applies to vessels less than 125 ft. Only Action 2, Alternative 2 meets the AFA mandate on this issue for replacement of AFA-eligible vessels.

Note that Action 2, Alternative 2 applies only to vessel replacement and not upgrades. That is, an AFA-eligible vessel can still upgrade within current 20% upgrade provisions (up to 125 ft), but would be restricted



in the event of replacement to a 10% increase (up to 165 ft). This difference applies only to replacement of AFA-eligible vessels.

For example: an 80 ft vessel could upgrade to 96 ft, or replace up to 88 ft if it sinks. However, as with the current regulations, it cannot “stack” upgrades and replacements. For example, if an 80 ft vessel upgrades to 96 ft and then it sinks, it can only upgrade to 96 ft.

Specific language that should be incorporated into the BSAI FMP is:

In the event of the actual total loss or constructive total loss of a vessel eligible under the American Fisheries Act, the owner of such vessel may replace such vessel with a vessel which shall be eligible in the same manner under that subsection as the eligible vessel, provided that—

- (1) such loss was caused by an act of God, an act of war, a collision, an act or omission of a party other than the owner or agent of the vessel, or any other event not caused by the willful misconduct of the owner or agent;
- (2) the replacement vessel was built in the United States and if ever rebuilt, was rebuilt in the United States;
- (3) the fishery endorsement for the replacement vessel is issued within 36 months of the end of the last year in which the eligible vessel harvested or processed pollock in the directed pollock fishery;
- (4) if the eligible vessel is greater than 165 feet in registered length, of more than 750 gross registered tons, or has engines capable of producing more than 3,000 shaft horsepower, the replacement vessel is of the same or lesser registered length, gross registered tons, and shaft horsepower;
- (5) if the eligible vessel is less than 165 feet in registered length, of fewer than 750 gross registered tons, and has engines incapable of producing less than 3,000 shaft horsepower, the replacement vessel is less than each of such thresholds and does not exceed by more than 10 percent the registered length, gross registered tons or shaft horsepower of the eligible vessel; and
- (6) the replacement vessel otherwise qualifies under federal law for a fishery endorsement, including under section 12102(c) of title 46, United States Code, as amended by this Act.

### 1.2.3 ACTION 3: GOA POLLOCK ALLOCATIONS SUNSET DATE

#### 1.2.3.1 Alternative 1: No Action.

The status quo alternative would allow the current allocations of GOA pollock and Pacific cod to expire in 2001. Choosing this alternative would mean that GOA inshore/offshore allocations would sunset three years prior to the sunset of BSAI pollock and P. cod allocations. An earlier sunset of GOA allocations relative to the BSAI is contrary to the Council’s intent since 1992 of linking the implementation of these allocations. Although the impacts of an earlier sunset in the GOA are not known, one potential impact could be a return to preemption of GOA fisheries or a reallocation of GOA pollock and cod, as discussed in detail in previous analyses (Amendments 40 and 51).

#### 1.2.3.2 Alternative 2: Extend the sunset date of the current pollock and Pacific cod allocations in the GOA FMP to conform with the date mandated for the Bering Sea/Aleutian Islands area in the American Fisheries Act of 1998.

The partial disapproval of BSAI Amendment 51 due to the AFA has resulted in different sunset durations in the GOA and BSAI for the inshore/offshore allocations. The BSAI allocations set under the AFA extend through December 31, 2004. Following the recommendation of the Administrator, NMFS Alaska Region, in a letter to the Council dated December 15, 1998, the Council considered and approved development of an analysis to revise the duration of the current GOA inshore/offshore allocations to match the duration of the current BSAI inshore/offshore allocations. Only Action 3, Alternative 2 would extend the current GOA allocations past the current sunset of December 31, 2001 to December 31, 2004 to match the expiration of the BSAI inshore/offshore allocations.

The Council record has been to link the GOA and BSAI inshore/offshore allocations under GOA Amendments 23, 40, and 51). The EA/RIR for GOA Amendment 51 allowed the Council to set the current GOA pollock and Pacific cod allocations in perpetuity and is included here by reference. All less restrictive dates are included in the analysis.

## 2.0 NEPA REQUIREMENTS: ENVIRONMENTAL IMPACTS OF THE ALTERNATIVES

An environmental assessment (EA) is required by the National Environmental Policy Act of 1969 (NEPA) to determine whether the action considered will result in significant impact on the human environment. If the action is determined not to be significant based on an analysis of relevant considerations, the EA and resulting finding of no significant impact (FONSI) would be the final environmental documents required by NEPA. An environmental impact statement (EIS) must be prepared for major Federal actions significantly affecting the human environment.

An EA must include a brief discussion of the need for the proposal, the alternatives considered, the environmental impacts of the proposed action and the alternatives, and a list of document preparers. The purpose and alternatives were discussed in Sections 1.1 and 1.2, and the list of preparers is in Section 8. This section contains the discussion of the environmental impacts of the alternatives including impacts on threatened and endangered species and marine mammals.

### 2.1 Environmental Impacts of the Alternatives

The environmental impacts generally associated with fishery management actions are effects resulting from (1) harvest of fish stocks which may result in changes in food availability to predators and scavengers, changes in the population structure of target fish stocks, and changes in the marine ecosystem community structure; (2) changes in the physical and biological structure of the marine environment as a result of fishing practices, e.g., effects of gear use and fish processing discards; and (3) entanglement/entrapment of non-target organisms in active or inactive fishing gear.

A summary of the effects of the annual groundfish harvests on the biological environment and associated impacts on marine mammals, seabirds, and other threatened or endangered species are discussed in the final environmental assessment for the annual groundfish total allowable catch specifications (NMFS 1998).

### 2.2 Impacts on Endangered or Threatened Species

Background. The ESA provides for the conservation of endangered and threatened species of fish, wildlife, and plants. The program is administered jointly by NMFS for most marine species, and the US Fish and Wildlife Service (FWS) for terrestrial and freshwater species.

The ESA procedure for identifying or listing imperiled species involves a two-tiered process, classifying species as either threatened or endangered, based on the biological health of a species. Threatened species are those likely to become endangered in the foreseeable future [16 U.S.C. §1532(20)]. Endangered species are those in danger of becoming extinct throughout all or a significant portion of their range [16 U.S.C. §1532(20)]. The Secretary of Commerce, acting through NMFS, is authorized to list marine mammal and fish species. The Secretary of the Interior, acting through the FWS, is authorized to list all other organisms.

In addition to listing species under the ESA, the critical habitat of a newly listed species must be designated concurrent with its listing to the “maximum extent prudent and determinable” [16 U.S.C. §1533(b)(1)(A)]. The ESA defines critical habitat as those specific areas that are essential to the conservation of a listed species and that may be in need of special consideration. The primary benefit of critical habitat designation is that it informs Federal agencies that listed species are dependent upon these areas for their continued existence, and that consultation with NMFS on any Federal action that may affect these areas is required. Some species, primarily the cetaceans, listed in 1969 under the Endangered Species Conservation Act and carried forward as endangered under the ESA, have not received critical habitat designations.

Listed Species. The following species are currently listed as endangered or threatened under the ESA and occur in the GOA and/or BSAI:

#### **Endangered**

Northern Right Whale	<i>Balaena glacialis</i>
Bowhead Whale <sup>1</sup>	<i>Balaena mysticetus</i>
Sei Whale	<i>Balaenoptera borealis</i>
Blue Whale	<i>Balaenoptera musculus</i>
Fin Whale	<i>Balaenoptera physalus</i>
Humpback Whale	<i>Megaptera novaeangliae</i>
Sperm Whale	<i>Physeter macrocephalus</i>
Snake River Sockeye Salmon	<i>Oncorhynchus nerka</i>
Short-tailed Albatross	<i>Diomedea albatrus</i>
Steller Sea Lion <sup>2</sup>	<i>Eumetopias jubatus</i>

#### **Threatened**

Snake River Fall Chinook Salmon	<i>Oncorhynchus tshawytscha</i>
Snake River Spring/Summer Chinook Salmon	<i>Oncorhynchus tshawytscha</i>
Steller Sea Lion <sup>3</sup>	<i>Eumetopias jubatus</i>
Spectacled Eider	<i>Somateria fishcheri</i>
Steller's eider	<i>Polysticta stelleri</i>

Section 7 Consultations. Because both groundfish fisheries are federally regulated activities, any negative affects of the fisheries on listed species or critical habitat and any takings<sup>4</sup> that may occur are subject to ESA section 7 consultation. NMFS initiates the consultation and the resulting biological opinions are issued to NMFS. The Council may be invited to participate in the compilation, review, and analysis of data used in the consultations. The determination of whether the action “is likely to jeopardize the continued existence of”

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<sup>1</sup>species is present in Bering Sea area only.

<sup>2</sup>listed as endangered west of Cape Suckling.

<sup>3</sup>listed as threatened east of Cape Suckling.

<sup>4</sup> the term “take” under the ESA means “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct” (16 U.S.C. §1538(a)(1)(B)).

endangered or threatened species or to result in the destruction or modification of critical habitat, however, is the responsibility of the appropriate agency (NMFS or FWS). If the action is determined to result in jeopardy, the opinion includes reasonable and prudent measures that are necessary to alter the action so that jeopardy is avoided. If an incidental take of a listed species is expected to occur under normal promulgation of the action, an incidental take statement is appended to the biological opinion.

Section 7 consultations have been done for all the above listed species, some individually and some as groups. Below are summaries of the consultations.

Endangered Cetaceans. NMFS concluded a formal section 7 consultation on the effects of the BSAI and GOA groundfish fisheries on endangered cetaceans within the BSAI and GOA on December 14, 1979, and April 19, 1991, respectively. These opinions concluded that the fisheries are unlikely to jeopardize the continued existence or recovery of endangered whales. Consideration of the bowhead whale as one of the listed species present within the area of the Bering Sea fishery was not recognized in the 1979 opinion, however, its range and status are not known to have changed. No new information exists that would cause NMFS to alter the conclusion of the 1979 or 1991 opinions. NMFS has no plan to reopen Section 7 consultations on the listed cetaceans for this action. Of note, however, are observations of Northern Right Whales during Bering Sea stock assessment cruises in the summer of 1997 (NMFS per. com). Prior to these sightings, and one observation of a group of two whales in 1996, confirmed sightings had not occurred.

Steller sea lion. The Steller sea lion range extends from California and associated waters to Alaska, including the Gulf of Alaska and Aleutian Islands, and into the Bering Sea and North Pacific and into Russian waters and territory. In 1997, based on biological information collected since the species was listed as threatened in 1990 (60 FR 51968), NMFS reclassified Steller sea lions as two distinct population segments under the ESA (62 FR 24345). The Steller sea lion population segment west of 144 W. longitude (a line near Cape Suckling, Alaska) is listed as endangered; the remainder of the U.S. Steller sea lion population remains listed as threatened.

NMFS designated critical habitat in 1993 (58 FR 45278) for the Steller sea lion based on the Recovery Team's determination of habitat sites essential to reproduction, rest, refuge, and feeding. Listed critical habitats in Alaska include all rookeries, major haul-outs, and specific aquatic foraging habitats of the BSAI and GOA. The designation does not place any additional restrictions on human activities within designated areas. No changes in critical habitat designation were made as result of the 1997 re-listing.

Beginning in 1990 when Steller sea lions were first listed under the ESA, NMFS determined that both groundfish fisheries may adversely affect Steller sea lions, and therefore conducted Section 7 consultation on the overall fisheries (NMFS 1991), and subsequent changes in the fisheries (NMFS 1992). The biological opinion on the BSAI and GOA fisheries effects on Steller sea lions issued by NMFS on January 26, 1996 concluded that these fisheries and harvest levels are unlikely to jeopardize the continued existence and recovery of the Steller sea lion or adversely modify critical habitat. NMFS conducted an informal Section 7 consultation on Steller sea lions for this action in 1997 and concluded that the GOA groundfish fishery and the 1997 TAC amounts were not likely to affect Steller sea lions in a way or to an extent not already considered in previous Section 7 consultations (NMFS, January 17, 1997). Reinitiation of formal consultation was not required at that time. NMFS has reopened formal consultation on the 1998 fishery to evaluate new information specific to the 60 percent increase of pollock TAC in the combined W/C Regulatory Area. The 1998 biological opinion concluded that the 1998 fishery was not likely to jeopardize the continued existence and recovery of Steller sea lions or to adversely modify critical habitat.

In December 1998, a Biological Opinion on the Steller sea lion concluded with a 'jeopardy finding' relative to the pollock fisheries in the BSAI and GOA. To allow these fisheries to continue in 1999 and beyond, the

Council recommended emergency action to implement measures consistent with reasonable and prudent alternatives (RPAs) recommended in the opinion. The emergency RPAs, in summary, proposed spatial and temporal distribution of the pollock fisheries as well as additional closure areas around specific rookery and haul-out sites used by sea lions.

For the BSAI, the Council's actions include: (1) separating the pollock fisheries into four seasons (A1, A2, B, and C seasons), with a limit of 30 percent of the total TAC coming from any one season; (2) reducing the overall roe season fishery to 40 percent of the annual total TAC; (3) limiting the overall A season removals from the sea lion critical habitat area/catcher vessel operational area (CH/CVOA) to 62.5 percent of the total TAC for those seasons; (4) eliminating a directed pollock fishery in the Aleutian Islands subarea; and, (5) expanding closure areas around rookery and haul-out sites.

For the GOA, the Council also created four seasons with limits on the percentage of the TAC which can be taken from any one season, expanded the closure areas around rookery and haul-out sites, and established a 300,000 pound trip limit for pollock in the Western and Central Gulf areas.

On January 22, 1999, NMFS published an emergency interim rule implementing RPAs which significantly reduced the likelihood that the pollock A season fishery off Alaska will jeopardize the continued existence of the western population of Steller sea lions. In the Bering Sea subarea, NMFS is phasing in an exclusion zone of 10 nm around the Cape Sarichef haulout, and anticipates extending the exclusion zone to around 20 nm for 2000 and beyond. In the Gulf of Alaska, NMFS will not implement a series of 10 nm exclusion zones until 2000. To avoid determinations of jeopardy for the latter half of the year, the emergency rule must be revised and extended for the latter half of 1999 and beyond. Final action is scheduled for June 1999. Anticipated actions in that rule address: 1) spatial distribution of pollock catch in the B and C season, 2) continued reduction of the cap inside the critical habitat/catcher vessel operating area complex in the A1 and A2 seasons, 3) pollock trawl exclusion zones, 4) rollover provision of underharvested catch, 5) starting date for the B season in the Bering Sea, 6) Western/Central GOA management issues, and 7) Western/Central GOA trip limits.

Pacific Salmon. No species of Pacific salmon originating from freshwater habitat in Alaska are listed under the ESA. These listed species originate in freshwater habitat in the headwaters of the Columbia (Snake) River. During ocean migration to the Pacific marine waters a small (undetermined) portion of the stock extend into the Gulf of Alaska as far east as the Aleutian Islands. In that habitat they are mixed with hundreds to thousands of other stocks originating from the Columbia River, British Columbia, Alaska, and Asia. The listed fish are not visually distinguishable from the other, unlisted, stocks. Mortal take of them in the chinook salmon bycatch portion of the fisheries is assumed based on sketchy information on abundance, timing, and migration patterns.

NMFS designated critical habitat in 1992 (57 FR 57051) for the for the Snake River sockeye, Snake River spring/summer chinook, and Snake River fall chinook salmon. The designations did not include any marine waters, therefore, does not include any of the habitat where the groundfish fisheries are promulgated.

NMFS has issued two biological opinions and no-jeopardy determinations for listed Pacific salmon in the Alaska groundfish fisheries (NMFS 1994, NMFS 1995). Conservation measures were recommended to reduce salmon bycatch and improve the level of information about the salmon bycatch. The no jeopardy determination was based on the assumption that if total salmon bycatch is controlled, the impacts to listed salmon are also controlled. The incidental take statement appended to the second biological opinion allowed for take of one Snake River fall chinook and zero take of either Snake River spring/summer chinook or Snake River sockeye, per year. As explained above, it is not technically possible to know if any have been taken. Compliance with the biological opinion is stated in terms of limiting salmon bycatch per year to under 55,000 and 40,000 for chinook salmon, and 200 and 100 sockeye salmon in the BSAI and GOA fisheries, respectively.

Short-tailed albatross. The entire world population in 1995 was estimated as 800 birds; 350 adults breed on two small islands near Japan (H. Hasegawa, per. com.). The population is growing but is still critically endangered because of its small size and restricted breeding range. Past observations indicate that older short-tailed albatrosses are present in Alaska primarily during the summer and fall months along the shelf break from the Alaska Peninsula to the GOA, although 1- and 2-year old juveniles may be present at other times of the year (FWS 1993). Consequently, these albatrosses generally would be exposed to fishery interactions most often during the summer and fall--during the latter part of the second and the whole of the third fishing quarters.

Formal consultation on the effects of the groundfish fisheries on the short-tailed albatross under the jurisdiction of the FWS concluded that BSAI and GOA groundfish fisheries would adversely affect the short-tailed albatross and would result in the incidental take of up to two birds per year, but would not jeopardize the continued existence of that species (FWS 1989). Subsequent consultations for changes to the fishery that might affect the short-tailed albatross also concluded no jeopardy (FWS 1995, FWS 1997).

Seven albatross have been taken since 1983. Recent takes in the longline fishery include two in 1995, one in October 1996, and two in 1998. Both 1995 birds were caught in the vicinity of Unimak Pass and were taken outside the observers' statistical samples. Two birds were reportedly taken in the BSAI groundfish hook-and-line fishery for Pacific cod during September 1998. A Biological Opinion is being prepared by FWS for short-tailed albatross for the 1999-2000 groundfish fisheries. The 1997-98 opinion has been extended into 1999 until the 1999-2000 opinion has been completed.

Seabird avoidance devices have been required in the groundfish longline fishery since 1997. The 1998 takes were by vessels employing seabird avoidance devices. The Council is scheduled to take final action on further seabird avoidance measures at its April 1999 meeting.

Spectacled Eider. These sea ducks feed on benthic mollusks and crustaceans taken in shallow marine waters or on pelagic crustaceans. The marine range for spectacled eider is not known, although Dau and Kitchinski (1977) review evidence that they winter near the pack ice in the northern Bering Sea. Spectacled eider are rarely seen in U.S. waters except in August through September when they molt in northeast Norton Sound and in migration near St. Lawrence Island. The lack of observations in U.S. waters suggests that, if not confined to sea ice polyneas, they likely winter near the Russian coast (FWS 1993). Although the species is noted as occurring in the GOA and BSAI management areas, no evidence exists that they interact with these groundfish fisheries.

Conditions for Re-initiation of Consultation. For all ESA listed species, consultation must be reinitiated if: the amount or extent of taking specified in the Incidental Take Statement is exceeded, new information reveals effects of the action that may affect listed species in a way not previously considered, the action is subsequently modified in a manner that causes an effect to listed species that was not considered in the biological opinion, or a new species is listed or critical habitat is designated that may be affected by the action.

## 2.3 Impacts on Marine Mammals Not Listed Under the ESA

Marine mammals not listed under the ESA that may be present in the GOA and BSAI include cetaceans, [minke whale (*Balaenoptera acutorostrata*), killer whale (*Orcinus orca*), Dall's porpoise (*Phocoenoides dalli*), harbor porpoise (*Phocoena phocoena*), Pacific white-sided dolphin (*Lagenorhynchus obliquidens*), and the beaked whales (e.g., *Berardius bairdii* and *Mesoplodon spp.*)] as well as pinnipeds [northern fur seals (*Callorhinus ursinus*), and Pacific harbor seals (*Phoca vitulina*)] and the sea otter (*Enhydra lutris*).

None of the alternatives will affect takes of other marine mammals not listed under the ESA. Therefore, none of the alternatives are expected to have a significant impact on marine mammals not listed under the ESA.

## 2.4 Coastal Zone Management Act

Implementation of each of the alternatives would be conducted in a manner consistent, to the maximum extent practicable, with the Alaska Coastal Management Program within the meaning of Section 30(c)(1) of the Coastal Zone Management Act of 1972 and its implementing regulations.

## 2.5 Conclusions or Finding of No Significant Impact

The alternatives under the three actions in this analysis address the duration of the inshore/offshore allocation of pollock and Pacific cod in the Gulf of Alaska. Neither alternative impacts the status of the stocks of either resource. Therefore, none of the alternatives are likely to significantly affect the quality of the human environment, and the preparation of an environmental impact statement for the proposed action is not required by Section 102(2)(C) of the National Environmental Policy Act or its implementing regulations.

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Assistant Administrator for Fisheries, NOAA

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Date

## 3.0 REGULATORY IMPACT REVIEW: ECONOMIC AND SOCIOECONOMIC IMPACTS OF THE ALTERNATIVES (E.O. 12866 considerations)

Executive Order 12866, "Regulatory Planning and Review," was signed on September 30, 1993, and established guidelines for promulgating and reviewing regulations. While the executive order covers a wide variety of regulatory policy considerations, the benefits and costs of regulatory actions are a prominent concern. Section 1 of the order deals with the regulatory philosophy and principles that are to guide agency development of regulations. The regulatory philosophy stresses that, in deciding whether and how to regulate, agencies should assess all costs and benefits of all regulatory alternatives. In choosing among regulatory approaches, the philosophy is to choose those approaches that maximize net benefits to society.

The regulatory principles in E.O. 12866 emphasize careful identification of the problem to be addressed. The agency is to identify and assess alternatives to direct regulation, including economic incentives, such as user fees or marketable permits, to encourage the desired behavior. When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. Each agency shall assess both the costs and benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

NMFS requires the preparation of a Regulatory Impact Review (RIR) for all regulatory actions that either implement a new FMP or significantly amend an existing plan or regulations. The RIR is part of the process of preparing and reviewing FMPs and provides a comprehensive review of the changes in net economic benefits to society associated with proposed regulatory actions. The analysis also provides a review of the problems and policy objectives prompting the regulatory proposals and an evaluation of the major alternatives that could be used to solve the problems. The purpose of the analysis is to ensure that the regulatory agency systematically and comprehensively considers all available alternatives so that public welfare can be enhanced in the most efficient and cost-effective way. The RIR addresses many of the items in the regulatory philosophy and principle of E.O. 12866.

E.O. 12866 requires that the Office of Management and Budget (OMB) review proposed regulatory programs that are considered to be significant. A “significant” regulatory action is one that is likely to:

1. Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.
2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.
3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof, or
4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

A regulatory program is “economically significant” if it is likely to result in the effects described in item (1) above. The RIR is designed to provide information to determine whether the proposed regulation is likely to be “economically significant.”

### 3.1 Economic and Social Impacts of the Management Alternatives

#### 3.1.1 ACTION 1: BSAI POLLOCK ALLOCATIONS

##### 3.1.1.1 Alternative 1: No action.

Action 1, Alternative 1 would take no action on the current inshore/offshore directed fishery pollock allocations in the BSAI FMP. The no action alternative would not conform with Section 206 of the AFA which specifically mandates an allocation of ten percent of the pollock TAC for a directed fishing allowance for the CDQ program and stipulates specific allocations for the inshore and offshore sectors of the directed pollock fisheries. A such, the no action alternative is not consistent with Congressional intent and is therefore not a viable management alternative.

##### 3.1.1.2 Alternative 2: Change the current inshore/offshore directed pollock allocations in the Bering Sea/Aleutian Islands FMP to conform with those allocations mandated by the American Fisheries Act of 1998.

Action 1, Alternative 2 would amend the BSAI FMP to reflect the BSAI CDQ and inshore/offshore directed pollock allocations as stipulated in the AFA, with a sunset date of December 31, 2004. The AFA clearly directs the Council and the Secretary to increase the pollock CDQ allocation from the existing 7.5 percent to 10 percent of the BSAI pollock TAC, and to change the directed fishery allocations to 50% to catcher vessels harvesting pollock for delivery to the inshore component; 40% to catcher processors harvesting pollock for processing by the offshore component; and 10% to catcher vessels harvesting pollock for processing by mother ships in the offshore component. The duration of the allocations, as specified in the Act, would expire in five years, though the CDQ allocation may be adjusted after two years. Section 213 of the AFA also mandates that the sunset date for these allocations be extended through December 31, 2004. Only Action 2, Alternative 2 meets the AFA requirements.

The current inshore/offshore directed pollock allocations identified in the BSAI FMP would be changed to the following allocations, with a sunset date of December 31, 2004:



10% of the BSAI pollock TAC to the Western Alaska community development program; and divide the remainder:

- 50% to catcher vessels harvesting pollock for delivery to the inshore component;
- 40% to catcher processors harvesting pollock for processing by the offshore component;
- 10% to catcher vessels harvesting pollock for processing by mother ships in the offshore component.

The AFA-mandated allocations will not be analyzed here. They were, however, included within the scope of the EA/RIR for Amendments 51/51 and are included here by reference.

### 3.1.2 ACTION 2: VESSEL REPLACEMENT

#### 3.1.2.1 Alternative 1: No action.

Action 2, Alternative 1 would leave the current inshore/offshore directed fishery pollock vessel replacement restrictions in place for all vessels in the BSAI FMP. This would not conform with Section 206 of the American Fisheries Act of 1998 which specifically mandates certain conditions for replacing AFA-eligible vessels. Therefore, the no action alternative is not consistent with the Act and is therefore not a viable management alternative.

#### 3.1.2.2 Alternative 2: Change restrictions in the BSAI FMP to conform with replacement requirements for eligible vessels under the American Fisheries Act of 1998.

Section 202 (a) (6) of the AFA mandated that in the event of the actual total loss or constructive loss, an AFA-eligible vessel may be replaced so long as the vessel was not lost due to willful misconduct of the owner or his agent. The replacement vessel must have been built in the US and if the vessel is (was) rebuilt, then that must also have taken place in the US. The replacement vessel must make a landing by the end of the third calendar year after the year the vessel is lost or destroyed. If the lost vessel was greater than 165 ft in registered length, of more than 750 gross registered tons, or has engines capable of producing more than 3,000 shaft horsepower, the replacement vessel must be of equal or lesser length, tons, and horsepower. If the lost vessel was less than 165 ft registered length, then the replacement vessel may exceed the original vessel's length, gross tons, and horsepower by 10 percent, but only up to the thresholds. The replacement vessel must also meet the US ownership provisions of the AFA.

The AFA restrictions for replacing vessels in the BSAI pollock fisheries are different from current replacement provisions implemented under the moratorium and LLP programs, which allow for a 20% upgrade or replacement only to vessels less than 125 ft. Only Action 2, Alternative 2 meets the AFA mandate on this issue to amend current replacement regulations regarding lost vessels to reflect the allowances under the Act for AFA-eligible vessels.

Length	Current regulations	AFA mandate
< 125 ft	20% increase	10% increase
125-165 ft	none	10%
>165 ft	none	none

Note that these provisions are more restrictive for AFA-eligible vessels than currently allowed in that it only allows a 10% increase in length while also being less restrictive because it does allow a vessel between 125 and 165 ft to increase its length, which is not allowed under current regulations. This new provision under Action 2, Alternative 2 does not allow for an upgrade for vessels greater than 125 ft (only replacement).

### 3.1.3 ACTION 3: GOA POLLOCK SUNSET DATE

#### 3.1.3.1 Alternative 1: No action.

The status quo alternative would retain the current sunset date of December 31, 2001 for the inshore/offshore allocations for pollock and P. cod in the Gulf of Alaska. This means that the GOA allocations would expire three years prior to those for the BSAI. It has been Council intent since 1992 to retain the linkage for the inshore/offshore allocations for the BSAI and GOA. If the GOA inshore/offshore allocations were allowed to lapse, the management void could create the preemption problems envisioned when the amendments were originally approved and implemented. Action 3, Alternative 1 does not conform with Council intent and would not be a viable management alternative for this fishery.

#### 3.1.2.2 Alternative 2: Extend the sunset date of the current pollock and Pacific cod allocations in the GOA FMP to conform with the date mandated for the Bering Sea/Aleutian Islands area in the American Fisheries Act of 1998.

Only Alternative 2 extends the current GOA allocations past the current sunset of December 31, 2001 for three additional years. The current sunset date of December 31, 2001, was specifically chosen to link with the sunset date for the BSAI allocations. The EA/RIR for Amendments 51/51 also contained specific language in the analysis for the GOA allocations to 'rollover' the GOA allocations without a sunset date. This recognized the acceptance and lack of controversy within the Council, fishing industry, environmentalists, and general public on the appropriateness of these allocations in the GOA. While voluminous public testimony was received on the BSAI allocations, none was received in opposition to the GOA allocations. Despite the general acceptance of the GOA allocations, the Council opted to 'rollover' the GOA allocations with a three-year sunset date to match the BSAI allocations. Action 2, Alternative 2, the Council's preferred alternative to extend the GOA inshore/offshore allocations through December 2004 is within the scope of the EA/RIR for Amendments 51/51. That analysis is included here by reference.

### 3.2 Administrative, Enforcement and Information Costs

No significant additional administrative, enforcement, or information costs are expected for any of the alternatives for the above actions.

## 4.0 INITIAL REGULATORY FLEXIBILITY ANALYSIS

### 4.1 Economic Impact on Small Entities

The AFA mandates establishment of specific BSAI pollock allocations and their duration under Action 1, as well as replacement criteria of AFA-eligible vessels under Action 2. The expiration of the Council's GOA pollock and cod allocations were intended to coincide with those in the BSAI (Action 3). Therefore, the three actions in this analysis represent a combination of Congressional and Council intent. The basic purpose of the proposed measures is to maintain the 'status quo' - i.e., to maintain essentially the current distribution of BSAI and GOA pollock and GOA Pacific cod (and processing) among competing user groups.

Appendix 1 and Section 3 of the EA/RIR for Amendments 51/51 contains detailed descriptions of the numbers, types, and characteristics of vessels and processors operating in the BSAI pollock fisheries. Section 4 of that EA/RIR contains projections of economic impacts (changes in gross revenues, for example). Section 8 contains the RFA analysis for the BSAI inshore/offshore alternatives. Only catcher vessels involved in the BSAI

pollock fisheries were determined to be small entities as defined by the RFA. Processors and catcher/processors were not defined as small entities. These determinations pertain to Actions 1 and 2.

Section 2.4.3 of the EA/RIR for Amendments 51/51 contains a similar description of the GOA pollock and P. cod fleet. In that RFA analysis, none of the affected individuals were determined to be significantly affected because the GOA sunset alternatives positively impacted all individuals affected by Action 3.

The RFA analyses from Amendments 51/51 are incorporated here by reference in their entirety.

## 4.2 Initial Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) first enacted in 1980 was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a federal regulation. Major goals of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business, (2) to require that agencies communicate and explain their findings to the public, and (3) to encourage agencies to use flexibility and to provide regulatory relief to small entities. The RFA emphasizes predicting impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts while still achieving the stated objective of the action.

On March 29, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act. Among other things, the new law amended the RFA to allow judicial review of an agency's compliance with the RFA. The 1996 amendments also updated the requirements for a final regulatory flexibility analysis, including a description of the steps an agency must take to minimize the significant economic impact on small entities. Finally, the 1996 amendments expanded the authority of the Chief Counsel for Advocacy of the Small Business Administration (SBA) to file *amicus* briefs in court proceedings involving an agency's violation of the RFA.

### 4.2.1 Requirement to Prepare an IRFA

If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. The central focus of the IRFA should be on the economic impacts of a regulation on small entities and on the alternatives that might minimize the impacts and still accomplish the statutory objectives. The level of detail and sophistication of the analysis should reflect the significance of the impact on small entities. Under 5 U.S.C., Section 603(b) of the RFA, each IRFA is required to address:

- C A description of the reasons why action by the agency is being considered;
- C A succinct statement of the objectives of, and the legal basis for, the proposed rule;
- C A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
- C A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

- C An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule;
- C A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes and that would minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
  1. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
  2. The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
  3. The use of performance rather than design standards;
  4. An exemption from coverage of the rule, or any part thereof, for such small entities.

#### 4.2.2 What is a Small Entity?

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) small government jurisdictions.

Small businesses. Section 601(3) of the RFA defines a ‘small business’ as having the same meaning as ‘small business concern’ which is defined under Section 3 of the Small Business Act. ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominate in its field of operation. The SBA has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor...A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the US including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of \$ 3 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or less persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$3 million criterion for fish harvesting operations. Finally a wholesale business servicing the fishing industry is a small businesses if it employs 100 or less persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or

substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50% or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) If two or more persons each owns, controls or has the power to control less than 50% of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors or general partners controls the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations. The RFA defines "small organizations" as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

#### 4.2.3 What is a Substantial Number of Small Entities?

In determining the scope, or 'universe,' of the entities to be considered in making a significance determination, NMFS generally includes only those entities, both large and small, that can reasonably be expected to be directly or indirectly affected by the proposed action. If the effects of the rule fall primarily on a distinct segment, or portion thereof, of the industry (e.g., user group, gear type, geographic area), that segment would be considered the universe for the purpose of this criterion. NMFS then determines what number of these directly or indirectly affected entities are small entities. NMFS generally considers that the 'substantial number' criterion has been reached when more than 20% of those small entities affected by the proposed action are likely to be significantly impacted by the proposed action. This percentage is calculated by dividing the number of small entities impacted by the action by the total number of small entities within the universe. The 20% criterion represents a general guide; there may be instances when, in order to satisfy the intent of the RFA, an IRFA should be prepared even though fewer than 20% of the small entities are significantly impacted.

#### 4.2.4 What is a Significant Economic Impact?

NMFS has determined that an economic impact is significant for the purposes of the RFA if a regulation is likely to result in:

- C more than a 5% decrease in annual gross revenues,
- C annual compliance costs (e.g., annualized capital, operating, reporting) that increase total costs of production by more than 5%,
- C compliance costs as a percent of sales that are 10 or more percent higher for small entities than compliance costs for large entities,
- C capital costs of compliance that represent a significant portion of capital available to small entities, considering internal cash flow and external financing capabilities, or
- C the regulation is likely to result in 2 or more percent of the small entities affected being forced to cease business operations.

Note that these criteria all deal with adverse or negative economic impacts. NMFS and certain other Federal agencies interpret the RFA as requiring the preparation of an IRFA only for proposed actions expected to have significant adverse economic impacts on a substantial number of small entities over the short, middle, or long term. Most regulatory actions are designed to have net benefits over the long term; however, such actions are not shielded from the RFA's requirement to prepare an IRFA if significant adverse economic impacts on a substantial number of small entities are expected in the short or longer term. Thus, if any action has short-term significant adverse impacts on a substantial number of small entities, even though it will benefit small entities in the long term, an IRFA must be prepared.

#### 4.2.5 Small Entities in the BSAI Pollock Fishery

The BSAI pollock sector industry profiles prepared for the Council's June 1997 meeting and contained in Appendix 1 of Amendments 51/51 identify: (1) the number of operations, by size, capacity, mode of processing, and product form; (2) catch, bycatch, discards, and utilization; (3) relative "operational dependence" deriving from BS/AI pollock fisheries; (4) product mix and output quantities of pollock; (5) price, by product form and markets; (6) employment patterns; (7) linkages to CDQ apportionments; and (8) ownership interests and patterns.

To identify the number and type of business concerns participating in the BS/AI pollock fishery that meet the definition "small entities," the operations described in that appendix must be measured against the size and affiliation standards outlined in Section 4.2.2. While available data on ownership and affiliation patterns in the BS/AI pollock fishery are not sufficiently detailed to discern whether each individual business concern meets the definition of "small entity," data available in the sector profiles do allow some general conclusions on the number of small entities in each industry component. These general conclusions are displayed in Table 1 for the base year 1996 (from Table 8.1.6 from the EA/RIR for Amendments 51/51).

Table 1 Estimated numbers and types of small entities participating in the BS/AI pollock fishery in 1996

<i><b>Industry component or type of entity</b></i>	<i><b>Small</b></i>	<i><b>Large</b></i>	<i><b>Total</b></i>
<u>Inshore sector</u>			
Inshore processors	0	8	8
Catcher-boats < 125 ft LOA	37	15	52
Catcher-boats $\geq$ 125 ft LOA	2	15	17
<u>Offshore sector</u>			
“True” motherships	0	3	3
Catcher-processors	0	31	31
Catcher-boats < 125 ft LOA	21	5	26
Catcher-boats $\geq$ 125 ft LOA	2	0	2
<u>Vessels delivering to both sectors</u>			
Catcher-boats < 125 ft LOA	1	13	14
Catcher-boats $\geq$ 125 ft LOA	0	8	8
<u>Small organizations</u> (CDQ groups)	6	0	6
<u>Government jurisdictions</u> (cities)	60	1	61

Inshore processors. Four of the 8 inshore processors operating in the BS/AI pollock fishery are either wholly owned subsidiaries or close affiliates of Japanese multi-national corporations. Due to their affiliation with large foreign entities with more than 500 employees worldwide, none of these processors is a small entity. Of the remaining 4 inshore processors, 3 are owned by US companies that employ more than 500 persons in all their affiliated operations, and therefore cannot be considered small entities. The remaining inshore processor has been identified as closely affiliated with its 5 delivering catcher-boats and the gross annual receipts of the affiliated entities taken together (the processor and its 5 affiliated catcher-boats) exceed the \$3 million criterion for fish harvesting operations. Therefore, none of the inshore processors in the BS/AI pollock fishery appear to meet the criteria for small entities.

Inshore catcher-boats. The sector profiles provided in Appendix 1 identify 119 catcher-boats altogether: 69 operate in the inshore sector exclusively, 28 operate in the offshore sector exclusively, and 22 operate in both sectors. Of the 91 catcher boats that operate exclusively or partly in the inshore sector, the ownership data in the sector profiles identify 26 vessels owned in whole or part by inshore processors. These 26 vessels may be considered to be affiliated with their respective inshore processor owners and cannot therefore be considered small entities because none of the inshore processors in the BSAI pollock fishery themselves are small entities. An additional 5 catcher boats have been identified as closely affiliated with an inshore floating processor and these 5 catcher boats taken together with their affiliated processor exceed the \$3 million criterion for fish harvesting operations and are therefore not believed to be small entities. Furthermore, an additional 20 catcher-boats have ownership affiliations with other catcher-boats or catcher processors. The gross annual receipts of each of these groups of affiliated catcher boats is believed to exceed the \$3 million criterion for small entities when all their fisheries earnings are taken as a whole. The remaining 40 catcher boats operating exclusively or partly in the inshore sector are believed to qualify as small entities.

Offshore catcher-boats. Twenty eight catcher boats operate in the offshore sector exclusively and 22 operate in both sectors for a total of 50 offshore catcher boats. Of these, 13 have ownership affiliations with large inshore or offshore processors and, therefore, do not meet the \$3 million criterion for small entities. An additional 13 catcher-boats have ownership affiliations with other vessels or operations that taken together with their affiliated entities are believed to exceed the \$3 million gross receipts criterion for small entities when all their fisheries earnings are taken as a whole. The remaining 24 catcher boats operating exclusively or partly in the offshore sector are believed to qualify as small entities.

“True” motherships. Three “true” motherships operate in the offshore sector. All 3 “true” motherships have ownership or business affiliations with large Japanese-owned processing companies, and are further affiliated with some of their delivering catcher boats. Taken together with their affiliated entities, none of the “true” motherships are believed to meet the criteria for small entities.

Offshore processors. To qualify as a small entity, a catcher processor must be independently owned and operated, have no more than 49% foreign ownership, and have gross annual receipts of less than \$3 million. None of the offshore catcher processors operating in the BSAI pollock fishery appear to meet the criteria for small entities.

Small organizations. The 6 CDQ groups participating in the BSAI pollock fishery are the only small organizations that have been identified as directly affected by the inshore/offshore alternatives under consideration. Impacts to these small organizations are analyzed in detail in Appendix 3.

Small governmental jurisdictions. The governmental jurisdictions with direct involvement in the BSAI pollock fishery are described in detail in Appendix 2. In Appendix 3, 56 CDQ communities and 4 Alaska non-CDQ communities (Unalaska, Sand Point, King Cove, and Kodiak) are identified as small governmental jurisdictions with direct involvement in the BSAI pollock fishery. The remaining government jurisdiction with direct involvement in the BSAI pollock fishery, Seattle, does not qualify as a small governmental jurisdiction.

#### Directly affected vessels, plants, and companies

As more thoroughly described in Chapter 11 of Amendments 61/61, the entities directly affected by the BSAI pollock allocations (Action 1) and replacement restrictions (Action 2) are a very well defined group as defined by the AFA. Harvesters and processors eligible for the BSAI pollock fisheries are either named specifically in the AFA or qualify by meeting specific criteria in the AFA. The Act specifies by name 20 catcher processors (offshore sector), owned by nine different companies, that are eligible to continue participating in the pollock fisheries. The Act further specifies three motherships which are eligible to process the mothership



allocation under the Act, and lists 19 catcher vessels which are eligible to fish and deliver that sector's allocation (2 others not specified are eligible through landings history).

For the inshore sector, the Act does not list the eligible plants and catcher vessels by name; rather, it stipulates the landing/processing history necessary for eligibility. For catcher vessels that is >250 mt delivered onshore in 1996, or 1997, or 1998 through September 1, or >40 mt for vessels under 60'. There are 113 catcher vessels eligible in the mothership and inshore categories (92 for inshore delivery, 7 for mothership delivery, and 14 which qualify for both). A shoreside processor must have processed >2,000 metric tons in both 1996 and 1997 to be eligible, except that processors who did less than 2,000 mt in both 1996 and 1997 would also be eligible, but restricted from processing more than 2,000 mt in any future year under the Act. Eight plants, owned by 7 companies fall under these definitions.

Based on information from Amendments 61/61 Chapter 10, as well as from information contained in Amendments 51/51 (the inshore/offshore 3 analysis) it appears that the only directly affected entities which would be classified as 'small entities' for Actions 1 and 2 would be a subset of the 113 catcher vessels described above. Essentially this would be the approximately 50 catcher vessels that are predominately independently owned. The remaining entities, including catcher/processors, motherships, shore plants, and catcher vessels owned by larger companies would exceed the criteria for defining small entities.

#### Indirectly impacted entities

Up to 60 coastal communities in Alaska appear to meet the definition of small entity for the purpose of the IRFA and could be impacted by Actions 1 and 2.

Taking BSAI and GOA groundfish and crab fisheries into account, there are as many as 1,300 additional catcher vessels which would likely qualify as small entities and which would be indirectly impacted by the proposed actions. This includes both fixed gear and trawl fishing vessels, ranging from 30' to over 100' in length, many of which are independently owned and operated.

#### 4.2.6 Final Regulatory Flexibility Analysis (FRFA)

When an agency issues any final rule, it must either prepare an FRFA or certify that the rule will not have a significant economic impact on a substantial number of small entities. The FRFA must discuss the comments received, the alternatives considered and the rationale for the final rule. Each FRFA must contain:

- C A succinct statement of the need for, and objectives of, the rule;
- C A summary of significant issues raised by the public comments in response to the IRFA, the agency's response to those comments, and a statement of any changes made to the rule as a result of the comments;
- C A description and estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available;
- C A description of the reporting, recordkeeping, or other compliance requirements of the rule; and
- C A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency that affect the impact on small entities was rejected.

The last item is the most notable change in the requirements for a FRFA under the 1996 amendments to the RFA. Previously, an agency had only to describe each significant alternative it had considered that could minimize the significant economic impact of the rule and provide a statement why each had been rejected. Under the 1996 amendments, an agency must provide an explanation of why it rejected significant alternatives to the chosen course that merely affect the economic impact of the rulemaking on small entities. Further, an agency must describe the steps it has taken to minimize the significant economic impact of the alternative it has chosen, including factual, legal, and policy reasons explaining why the agency selected the preferred alternative.

The FRFA will be completed by NMFS after opportunity for public comment on the proposed rule and IRFA.

## 5.0 SUMMARY AND CONCLUSIONS

The American Fisheries Act of 1998 (AFA) significantly changed the management regime of the pollock fisheries in the Bering Sea, Aleutian Islands, and Gulf of Alaska. The AFA substantially changed the statutory climate in which the Council was acting during its deliberation for final action of I/O3 in June 1998. Along with other actions affecting the BSAI pollock fishery, it allocated 10% of the BSAI pollock TAC to the Western Alaska community development program (increased from 7.5%) and divided the remaining directed pollock fishery allocation: 50% to catcher vessels harvesting pollock for delivery to the inshore component; 40% to catcher processors harvesting pollock for processing by the offshore component; and 10% to catcher vessels harvesting pollock for processing by a new mothership component. As a result of AFA, on December 15, 1998, the Secretary disapproved the inshore/offshore allocations recommended by the Council in BSAI Amendment 51 for the period January 1, 1999 through December 31, 2001 and substituted the AFA percentages for 1999. Changing these percentages through 2004 in the BSAI FMP to conform with the AFA is the subject of Action 1.

AFA also signed into law changes to replacement restrictions for AFA-eligible vessels. This is the subject of Action 2. Action 3 is the sole action under consideration under GOA Amendment 62. This action is not mandated under the AFA, but conforms with Council intent to mirror the allocation sunset dates for pollock and Pacific cod allocations in the GOA and BSAI.

During its discussion of preparation of this analysis, the Council indicated that the actions under Alternative 2 for Actions 1, 2, and 3 were its preferred alternatives.

None of the alternatives are likely to significantly affect the quality of the human environment. None of the alternatives is expected to result in a "significant regulatory action" as defined in E.O. 12866. However, the FRFA will be completed by NMFS after opportunity for public comment on the proposed rule and IRFA.

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